MOTION FILED

MAY 20 1994

No. 93-1535

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
and MON VALLEY ENERGY CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF METROPOLITAN EDISON COMPANY AND PENNSYLVANIA ELECTRIC COMPANY IN SUPPORT OF PETITIONERS

ALAN MICHAEL SELTZER
(Counsel of Record)
JEFFREY A. FRANKLIN
RYAN, RUSSELL, OGDEN & SELTZER
1100 Berkshire Boulevard
P.O. Box 6219
Reading, Pennsylvania 19610-0219
(610) 372-4761
Counsel for Amici Curiae Metropolitan Edison Company and Pennsylvania Electric Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

26 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1535

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
and MON VALLEY ENERGY CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rules 21 and 37 of the Rules of the United States Supreme Court, amici curiae Metropolitan Edison Company ("Met-Ed") and Pennsylvania Electric Company ("Penelec"), hereinafter collectively referred to as the "Companies", respectfully pray that this Court grant leave for the Companies to file the attached amici brief in this proceeding. The Companies obtained the written consent of Petitioners West Penn Power Company, Armco Advanced Materials Company, and Allegheny Ludlum Corporation, and Respondent Pennsylvania Public Utility

Commission ("Commission"), but Respondent Mon Valley Energy Corporation has not consented to the Companies' participation in this proceeding. Therefore, the Companies hereby request permission to file the attached amici brief in support of Petitioners' Petition for a Writ of Certiorari. Copies of the letters of consent are being filed with the Clerk of Court concurrently with this motion and the attached brief.

INTEREST OF AMICI CURIAE

Met-Ed is a Pennsylvania electric public utility incorporated pursuant to the laws of Pennsylvania on July 24, 1922 to furnish light, heat and power by means of electricity to the public. Met-Ed currently furnishes retail electric service to over 400,000 customers in a 3,274 square mile area encompassing portions of fourteen counties in eastern and central Pennsylvania. Penelec is a Pennsylvania electric public utility that was incorporated pursuant to the laws of Pennsylvania on June 11, 1919 to furnish light, heat and power by means of electricity to the public, and currently furnishes retail electric service to more than 500,000 customers over a 17,000 square mile service territory located in thirty-one counties in western, northern and south central Pennsylvania.

Met-Ed and Penelec are wholly-owned operating subsidiary companies of General Public Utilities Corporation ("GPU"). The bulk energy supply facilities of Met-Ed and Penelec, along with a sister-company known as Jersey Central Power & Light Company, are interconnected and operated as a single integrated power supply system, which in turn is interconnected and operated in concert with facilities of several neighboring electric utilities in Pennsylvania, New Jersey, Maryland, Delaware, Virginia and the District of Columbia. This interconnected system is referred to as the "PJM" Power Pool. PJM supplies electricity to over 20 million people in the mid-Atlantic region of the United States.

Met-Ed and Penelec have been among the Pennsylvania leaders in the procurement of capacity and related energy from developers of electric generating facilities under the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 16 U.S.C. § 796, 824a-3, *et seq.* ("PURPA"). In accordance with PURPA, the regulations implemented by the Federal Energy Regulatory Commission ("FERC") at 18 C.F.R. Part 292 ("FERC Regulations") and the Commission's regulations at 52 Pa. Code § 57.31 *et seq.*, ("Cogeneration Regulations"), Met-Ed and Penelec presently have entered into long-term power purchase agreements ("PPAs") with approximately 22 major non-utility generation projects totalling in excess of 1400 megawatts ("MW"). By 1998, the Companies' annual payments to developers for purchases of capacity and related energy are expected to be in excess of $600 million. In addition, more than 25% of the Companies' energy supply requirements will be met by purchases from non-utility generators. Met-Ed and Penelec also have pioneered the first-ever competitive procurement of qualifying facilities ("QFs") under PURPA in the Commonwealth of Pennsylvania, having completed this effort earlier in 1994.

The Companies have a clear interest in assuring that their purchases of long-term capacity and related energy from QFs are at a reasonable cost and in accordance with PURPA, the FERC Regulations and the Cogeneration Regulations. However, it is not in the public interest for customers to pay for electric capacity and energy that is overpriced as a result of the erroneous implementation of PURPA and applicable regulations. Specifically, the Companies submit that, in the instant case, the Commission unlawfully and inappropriately refused to consider relevant and timely information relating directly to West Penn's avoided costs, thus violating PURPA and related regulations. If not corrected by this Court, the Commission's action will impose unnecessary and excessive costs upon electric utilities and their customers at a time high-

lighted by increasing competition in the electric utility industry.[1]

Met-Ed and Penelec can provide this Court with a different perspective than other parties regarding the significance of the errors of the Commission and the Pennsylvania appellate courts in their implementation of PURPA and applicable regulations.

CONCLUSION

For the reasons set forth above and in the attached brief, the Companies request this Court to grant this Motion for Leave to File the amici curiae brief attached hereto.

Respectfully submitted,

ALAN MICHAEL SELTZER
(Counsel of Record)
JEFFREY A. FRANKLIN
RYAN, RUSSELL, OGDEN & SELTZER
1100 Berkshire Boulevard
P.O. Box 6219
Reading, Pennsylvania 19610-0219
(610) 372-4761
Counsel for Amici Curiae Metropolitan Edison Company and Pennsylvania Electric Company

Dated: May 20, 1994

---

[1] Under applicable law in Pennsylvania, customers pay directly for the payments made by electric utilities to QF's under PURPA through the energy cost rate ("ECR") component of the Companies' rates. The Commission and the lower Pennsylvania Courts have consistently upheld the right of electric utilities to recover from customers all costs incurred under PPAs entered into pursuant to the provisions of PURPA. See attached brief for citations.

QUESTIONS PRESENTED

1. Whether a state public utility commission may unilaterally amend, under PURPA, and over the objection of the utility, a voluntarily negotiated power purchase agreement between an electric utility and QF that has expired; and

2. Whether, upon substantial modification of a lapsed power purchase agreement between a QF and an electric utility, PURPA and related regulations require a specific finding that the legally enforceable obligation first arose at the time of the modification, thereby requiring a new determination of avoided costs.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. STATUTORY FRAMEWORK	6
II. APPLICABLE FACTS	7
III. THE RULINGS BELOW	8
A. PURPA Requires State Public Utility Commissions To Assess the Public Interest Prior to Approving Any QF Purchase Rates	10
B. State Public Utility Commissions Have No Authority Under PURPA To Modify the Terms and Conditions of a Voluntarily Negotiated PPA	13
CONCLUSION	17

TABLE OF AUTHORITIES

CASES: Page

Allegheny Ludlum Corp. v. Pennsylvania Public Utility Comm'n, 149 Pa. Commw. Ct. 106, 612 A.2d 604 (1992) 11
American Paper Institute v. American Electric Power Serv. Corp., 461 U.S. 402 (1983) 10, 14
Armco Advanced Materials Corp. v. Public Utility Comm'n, 135 Pa. Commw. Ct. 15, 579 A.2d 1337 (1990), 634 A.2d 207 (1993), cert. pending, No. 93-1341 (Feb. 22, 1994) ("*Milesburg II*") 9
FERC v. Mississippi, 456 U.S. 742 (1982) 6
In re Long Island Lighting Co., 606 N.Y.S. 2d 406 (App. Div., 3d Dep't. 1993) 12
In re Vicon Recovery Systems, 153 Vt. 539, 572 A.2d 1355 (1990) 15
Kansas City Power & Light Co. v. State Corp. Commission, 234 Kan. 1052, 676 P.2d 764 (1984) 14
Petition of East Georgia Cogeneration, 158 Vt. 525, 614 A.2d 799 (1992) 12
Public Utility Comm'n v. Gulf States Utilities Co., 809 S.W.2d 201 (Tex. 1991) 15
Smith Cogeneration Management, Inc. v. The Corporation Commission, 863 P.2d 1277 (Supp. Ct. Okl. 1993) 12
Snow Mountain Pine Co. v. Maudlin, 84 Or. App. 590, 734 P.2d 1366 (1987) 12
Lehigh Valley Power Committee v. Pennsylvania Public Utility Comm'n, 128 Pa. Commw. Ct. 276, 563 A.2d 548 (1989) 4, 8

STATUTES:

16 U.S.C. § 824a-3(b) 16
Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 16 U.S.C. § 796, 824a-3, *et seq.* ("PURPA") 3
PURPA § 210(a), 16 U.S.C. § 824a-3 6
PURPA § 210(a), 16 U.S.C. § 824a-3(b) 6

TABLE OF AUTHORITIES—Continued

	Page
REGULATIONS:	
18 C.F.R. Part 292 ("FERC Regulations")	3
18 C.F.R. Part 292.301(b)	13
18 C.F.R. Part 292.304(a)	6
18 C.F.R. Part 292.304(b)(5)	7
18 C.F.R. Part 292.304(d)	7
52 Pa. Code § 57.31 *et seq.* ("Cogeneration Regulations")	3
REGULATORY PROCEEDINGS:	
AES Beaver Valley, Inc. v. West Penn Power Co., Docket No. C-844022, 59 Pa. PUC 444 (1985)	4, 8
In re Middle South Services, Inc., 33 F.E.R.C. (CCH) § 61000, 408, 71 PUR 4th 580 (1985)	7
In re West Penn Power Co. (Allegheny Lock and Dam No. 5), 62 Pa. PUC 612 (1987)	4, 8
In re West Penn Power Co. (Allegheny Lock and Dam No. 6), 62 Pa. PUC 606 (1987)	4, 8
Petition of Pennsylvania Electric Co. Re Scrubgrass Power, Docket No. P-870248, Pennsylvania Public Utility Comm'n, 66 Pa. PUC 151 (January 21, 1988)	4, 8
MISCELLANEOUS:	
45 Fed. Reg. 12,217	14
H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 97 (1978)	6
Notice of Proposed Rulemaking, Administrative Determination of Avoided Costs, Rates for Sales of Power to Qualifying Facilities, and Interconnection Facilities, Docket No. Rm. 88-6-00; IV F.E.R.C. Statutes and Regulations (CCH) ¶ 32,457 (1988)	10
Petitioners' Appendix	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1535

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
and MON VALLEY ENERGY CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

BRIEF OF AMICI CURIAE METROPOLITAN EDISON COMPANY AND PENNSYLVANIA ELECTRIC COMPANY IN SUPPORT OF PETITIONERS

Amici curiae Metropolitan Edison Company ("Met-Ed") and Pennsylvania Electric Company ("Penelec"), hereinafter collectively referred to as the "Companies", respectfully pray that the Court grant the Petition of West Penn Power Company ("West Penn"), for a Writ of Certiorari to the Commonwealth Court of Pennsylvania in this matter. Petitioners West Penn, Armco Advanced Materials Company and Allegheny Ludlum Corporation, as well as Respondent Pennsylvania Public Utility Commission ("Commission"), have consented to the filing of this Brief. Respondent Mon Valley Energy Corporation

("Mon Valley") has declined to provide its consent. Copies of the aforesaid consents and non-consent are being filed with the Clerk of the Court concurrently with this brief pursuant to Rules 21 and 37 of the Rules of the United States Supreme Court.

INTEREST OF AMICI CURIAE

The Companies are vitally interested in a rationally consistent and fair application of PURPA and the FERC Regulations in order to concurrently encourage QF development, protect customers and permit electric utilities to compete in today's competitive marketplace.

The Commission's Order, affirmed by the Commonwealth Court of Pennsylvania, departs from PURPA, as interpreted throughout the nation, and places the Companies, other electric utilities, and customers in a precarious position. In short, it forces customers to overpay for capacity and related energy from QFs, thereby rendering utilities less able to compete in the market for the delivery of electricity.

Met-Ed is a Pennsylvania electric public utility that currently furnishes retail electric service to over 400,000 customers in a 3,274 square mile area encompassing portions of fourteen counties in eastern and central Pennsylvania. Penelec is a Pennsylvania electric public utility that currently furnishes retail electric service to more than 500,000 customers over a 17,000 square mile service territory located in thirty-one counties in western, northern and south central Pennsylvania.

Met-Ed and Penelec are wholly-owned operating subsidiary companies of General Public Utilities Corporation ("GPU"). The bulk energy supply facilities of Met-Ed and Penelec, along with a sister-company known as Jersey Central Power & Light Company, are interconnected and operated as a single integrated power supply system, which in turn is interconnected and operated in concert

with facilities of several neighboring electric utilities in Pennsylvania, New Jersey, Maryland, Delaware, Virginia and the District of Columbia. This interconnected system is referred to as the "PJM" Power Pool. PJM supplies electricity to over 20 million people in the mid-Atlantic region of the United States.

Met-Ed and Penelec have been among the Pennsylvania leaders in the procurement of capacity and related energy from developers of electric generating facilities under the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 16 U.S.C. § 796, 824a-3, *et seq.* ("PURPA"). In accordance with PURPA, the regulations implemented by the Federal Energy Regulatory Commission ("FERC") at 18 C.F.R. Part 292 ("FERC Regulations") and the Commission's regulations at 52 Pa. Code § 57.31 *et seq.* ("Cogeneration Regulations"), Met-Ed and Penelec have entered into long-term power purchase agreements ("PPAs") with approximately 22 major non-utility generation projects totalling in excess of 1400 megawatts ("MW"). By 1998, the Companies' annual payments to developers for purchases of capacity and related energy are expected to be in excess of $600 million. In addition, more than 25% of the Companies' energy supply requirements will be met by purchases from non-utility generators.

Met-Ed has also pioneered the first-ever competitive procurement of qualifying facilities ("QFs") under PURPA in the Commonwealth of Pennsylvania, having completed this effort earlier in 1994.

The Companies have a clear interest in assuring that their purchases of long-term capacity and related energy from QFs are at a reasonable cost and in accordance with PURPA, the FERC Regulations and the Cogeneration Regulations. However, it is not in the public interest for customers to pay for electric capacity and energy that is overpriced as a result of an erroneous implementation of PURPA and applicable regulations. Specifically, the Com-

panies submit that, in the instant case, the Commission unlawfully refused to admit in evidence and consider relevant and timely information relating directly to West Penn's avoided costs, thus violating PURPA and related regulations. If not corrected by this Court, the Commission's action will impose unnecessary and excessive costs upon electric utilities and their customers at a time highlighted by increasing competition in the electric utility industry.[1]

SUMMARY OF ARGUMENT

There is no question that the original PPA filed voluntarily by West Penn and Mon Valley ("West Penn/Mon Valley PPA") included mutually negotiated prices and dates for achieving certain key milestones. Petitioner's Appendix E, at 36a-85a. What is in substantial dispute, however, is the legality of the Commission's imposition of new price terms in the PPA after the original agreement lapsed by its own terms, without affording West Penn an opportunity to demonstrate, based upon then current information, its lawful avoided costs under PURPA and applicable regulations.

The resolution of that dispute depends upon *when* a "legally enforceable obligation" exists under PURPA and

---

[1] Under applicable law in Pennsylvania, customers pay directly for the payments made by electric utilities to QFs under PURPA through the energy cost rate ("ECR") component of the Companies' rates. The Commission and the lower Pennsylvania Courts have consistently upheld the right of electric utilities to recover from customers all costs incurred under PPAs entered into pursuant to the provisions of PURPA. See *AES Beaver Valley, Inc. v. West Penn Power Company*, Docket No. C-844022, 59 Pa. PUC 444 (1985); *In re West Penn Power Company (Allegheny Lock and Dam No. 5*, 62 Pa. PUC 612, 1987); *In re West Penn Power Company (Allegheny Lock and Dam No. 6)*, 62 Pa. PUC 606 (1987); *Petition of Pennsylvania Electric Company Re Scrubgrass Power*, Docket No. P-870248, Pennsylvania Public Utility Comm'n, 66 Pa. PUC 151 (January 21, 1988); *Lehigh Valley Power Committee v. Pennsylvania Public Utility Comm'n*, 128 Pa. Commw. Ct. 276, 563 A.2d 548 (1989).

the FERC regulations. This question is of enormous significance to the electric utility industry, particularly when energy prices are volatile and the expected period of contractual commitment is lengthy.

PURPA and the FERC Regulations were never intended to allow widely differing standards to emerge from state public utility commissions on such a critical issue as the determination of avoided costs. Guidance from this Court is necessary to avoid increasingly inconsistent results on this issue which carry enormous and long-term (*i.e.*, in excess of 20 years) cost consequences for electric utilities and their customers.

Inasmuch as Congress, in enacting PURPA, mandated that the interests of utility customers be balanced with those of QF developers, it is essential that state public utility commissions scrupulously protect *both* key constituents. By granting the subject Petition, this Court can meaningfully assist the states in their mandated implementation of PURPA by more clearly defining (a) the type, nature and extent of factual evidence necessary to establish the existence of a legally enforceable obligation and (b) the legal standards to be used by state public utility commissions in balancing the interests of utility customers *and* QF developers.

ARGUMENT

I. STATUTORY FRAMEWORK

In 1978, Congress enacted PURPA as part of a package of legislation to combat the nationwide energy crisis resulting from the quadrupling of oil prices in the early 1970's and the severe shortage of natural gas in 1977. *FERC v. Mississippi*, 456 U.S. 742, 745 (1982). PURPA § 210(a), 16 U.S.C. § 824a-3, directs FERC to promulgate rules to encourage the development of alternative sources of power, including rules requiring utilities to offer to buy electricity from, and sell electricity to, QFs. FERC carried out its PURPA mandate to issue regulations to encourage the development of alternative sources of electric power by promulgating the FERC Regulations that are presently contained at 18 C.F.R. Part 292.

PURPA § 210, 16 U.S.C. § 824a-3(b), relating to rates for purchases by electric utilities from QF's, embodies the "avoided cost" pricing rule. This section requires that FERC's rules (i) establish purchase rates that are "just and reasonable to electric consumers of the electric utility and in the public interest", (ii) not discriminate against QF's, and (iii) not "provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy". 18 C.F.R. § 292.304(a).

The Conference Report on the bill that became PURPA elaborates on the concept of "just and reasonable rates to consumers":

> "The conferees intend that the phrase 'just and reasonable to electric consumers of the utility' be interpreted in a manner which looks to protect the interest of the electric consumer in receiving electric energy at equitable rates."

H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 97 (1978).

The FERC has addressed the PURPA requirement to protect the interests of utility customers in the overall im-

plementation of PURPA. In essence, utility customers should be in the same or very similar position they would have been if the QF output had not been purchased. *See, e.g., In re Middle South Services, Inc.*, 33 F.E.R.C. (CCH) § 61000, 408, 71 PUR 4th 580, 594 (1985).

Under the FERC Regulations, a QF can elect to be compensated for sales of energy and capacity based upon estimates of future avoided costs.[2] Under this option, the compensation paid by electric utilities to QFs under the FERC Regulations is based upon the concept of a "legally enforceable obligation". Section 304(d) of the FERC Regulations, 18 C.F.R. § 292.304(d), provides, in relevant part, as follows:

> "(d) Purchases "as available" or pursuant to a legally enforceable obligation.
>
> Each qualifying facility shall have the option either: . . . (2) to provide energy or capacity pursuant to a *legally enforceable obligation* for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility, exercised prior to the beginning of a specified term, be based on either (i) The avoided cost calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." (emphasis added).

II. APPLICABLE FACTS

The Companies adopt the statement of facts presented in West Penn's Petition and will only briefly summarize the most salient facts herein.

West Penn initially entered into a PPA with Respondent Mon Valley in connection with Mon Valley's proposed

---

[2] 18 C.F.R. § 292.304(b)(5) provides:

> "In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery."

Shannopin Mine Project, a QF under PURPA. Petitioner's Appendix E at 36A-39A. Pursuant to the customary procedure in Pennsylvania, West Penn sought to have the Commission grant rate recovery for the costs proposed to be incurred thereunder.[3]

When the Commission granted West Penn's Petition requesting rate recovery without a hearing, certain customers objected on the basis of claimed due process violations. While the due process arguments were being litigated on appeal before the Pennsylvania courts, the administrative process associated with the West Penn/Mon Valley PPA was halted and the freely negotiated contract milestone dates passed. Accordingly, the PPA expired by its own terms.

The West Penn/Mon Valley PPA had expired by the time the Commission conducted an administrative hearing after all the earlier due process claims had been resolved. West Penn's avoided costs and capacity needs had also changed. Over West Penn's vigorous objection, the Commission declined to admit any testimony regarding West Penn's new avoided costs and capacity needs. Petitioner's Appendix T at 387a and 393a. Instead, the Commission ruled that, despite the expiration of the West Penn/Mon Valley PPA and the Commission's own modifications, the date on which Mon Valley had incurred a "legally enforceable obligation", and thus the date as of which avoided costs were to be calculated, remained the same as the original agreement.

III. THE RULINGS BELOW

The Commonwealth Court of Pennsylvania, in a 4-3 decision, ruled that the Commission had the authority to modify the West Penn/Mon Valley PPA, and that the modifications (which included revised pricing and milestone dates) did not result in a "new" PPA or a "new"

---

[3] See Footnote 1 above.

date for purposes of establishing avoided costs. Instead, the Commonwealth Court required West Penn to compensate Mon Valley on the basis of capacity rates that were established some four years earlier in the original (and now lapsed) West Penn/Mon Valley PPA. The Commonwealth Court's decision relied almost exclusively on the Pennsylvania Commonwealth Court's decision in *Armco Advanced Materials Corporation v. Public Utility Comm'n*, 135 Pa. Commonwealth Ct. 15, 579 A.2d 1337 (1990), 634 A.2d 207 (1993), cert. pending, No. 93-1341 (February 22, 1994) ("*Milesburg II*").

In *Milesburg II*, the Commonwealth Court of Pennsylvania (an intermediate appellate court) confirmed the authority of the Commission to direct an extension of a previously lapsed PPA between West Penn and another QF developer on the theory that the PPA was submitted to the Commission for approval and was therefore not a private agreement between the parties. While acknowledging that a purely private agreement not conditioned upon Commission approval could allow the parties to bargain away certain specific rights and obligations, the Court held that a PPA submitted to the Commission for approval subjects the entire agreement to the scrutiny of the Commission in all respects, including extensions of previously expired contract milestone dates. Moreover, the Commonwealth Court held that the date the original PPA was executed controlled the determination of avoided costs (i.e., the time of contract execution was the date of the legally enforceable obligation).

The Commonwealth Court's decision in *Milesburg II* was affirmed by the Pennsylvania Supreme Court in a per curiam opinion decided November 24, 1993 at Docket No. 0109 W.D. Appeal Docket 1991, and reported at 634 A.2d 207 (1993). Of the six Pennsylvania Supreme Court Justices sitting in the case, three voted to affirm *Milesburg II*, while three justices would have reversed the Commonwealth Court's decision in *Milesburg II*, claiming that the standard utilized by the Commission to establish

the time for determining "avoided costs" was in conflict with the definition of a "legally enforceable obligation" under the FERC Regulations.

In the instant case, the Pennsylvania Supreme Court denied discretionary review of the Commonwealth Court's decision without discussion. Petitioner's Appendix A and B.

A. PURPA Requires State Public Utility Commissions To Assess the Public Interest Prior to Approving Any QF Purchase Rates

Any purchase rates from QFs must be "just and reasonable to electric consumers of the electric utility and in the public interest". PURPA Section 210, 16 U.S.C. § 824a-3(b). Electric utility customers should be "indifferent" to QF purchases by electric utilities. The concept of customers indifference to PURPA implementation was employed by FERC in its *Notice of Proposed Rulemaking, Administrative Determination of Avoided Costs, Rates for Sale of Power to Qualifying Facilities, and Interconnection Facilities,* Docket No. Rm. 88-6-00; IV F.E.R.C. Statutes and Regulations (CCH) ¶ 32,457 (1988):

> "Under Section 210 of PURPA, an electric utility's ratepayers are intended to be at least indifferent, in terms of the rates they pay, as to the source of power. In other words, the ratepayer is not to pay any more for power because the utility has purchased power from a QF rather than generating the power itself or purchasing power from another wholesale source. This is the principle underlying the incremental cost ceiling on the rates utilities have to offer to purchase QF power."

This Court, in *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983) also recognized that the interests of electric utility customers must be protected under PURPA.

The Pennsylvania Courts have also acknowledged the requirement imposed on the Commission to make explicit findings regarding the protection of customer interests under PURPA:

> "[PURPA and the FERC Regulations] definitely incorporate the concept of individual ratepayer indifference and protection from any inequitable effects resulting from the implementation of a mandated purchase of power from a QF, regardless of whether the overall price paid is at or below FAC [Full Avoided Cost]. To the extent that a rate resulting from a purchase from a QF works substantial inequitable treatment on a particular ratepayer, it violates Section 210 of PURPA."

Allegheny Ludlum Corp. v. Pennsylvania Public Utility Comm'n, 149 Pa. Commw. Ct. 106, 118, 612 A.2d 604, 610 (1992).

The three judge dissent in the Commonwealth Court understood the need for a thorough analysis of customer economic impacts in order to fulfill the PURPA mandate that such rates balance the interests of utility ratepayers and QFs:

> "West Penn attempted to show before the PUC that modifying the Purchase Agreement was not in the ratepayers' best interest because the 1987 projection that it would need additional base rate power in 1995 that Mon Valley would supply has proven to be erroneous. Because its forecast was erroneous, the avoided costs, upon which the amount West Penn would pay Mon Valley was calculated, was also incorrect. If required to pay that rate for that power, $500,000,000 more in rates would have to be charged to ratepayers to cover the costs of this unneeded capacity."

Petitioner's Appendix C, at 32a.

The Commission failed to consider the public interest and otherwise protect the interest of utility customers in this case because it refused to allow West Penn to show

that its avoided costs and capacity needs had dropped substantially subsequent to the execution of the original West Penn/Mon Valley PPA. The failure to allow relevant and timely evidence directly affecting West Penn's customers (i.e., the public interest) resulted in the Commission establishing pricing for its unilateral "modification" of the West Penn/Mon Valley PPA based upon avoided costs that were outdated and irrelevant to West Penn's then present circumstances.

The Commission's failure to utilize current information in estabishing the applicable avoided costs for West Penn is inconsistent with several decisions from other states which (a) restrict utility payments to QFs to no more than full avoided cost and (b) require avoided costs to be set based on current data and information. See *Snow Mountain Co. v. Maudlin*, 84 Or. App. 590, 599, 734 P.2d 1366, 1370-71 (1987) ("a qualifying facility's self-imposed obligation to deliver energy triggers a utility's obligation to purchase" and the "date on which the qualifying facility obligates itself to deliver energy fixing the date on which 'avoided costs' are determined"); *In re Long Island Lighting Co.*, 606 N.Y.S. 2d 406, 407-08 (App. Div., 3d Dep't, 1993) (state commission abused its discretion in compelling utility to use 1989 avoided costs in a power purchase agreement executed in 1990); *Smith Cogeneration Management, Inc. v. The Corporation Commission*, 863 P.2d 1277, 1234-35 (Sup. Ct. Okl. 1993) (cogenerator was not entitled to "have avoided costs fixed for the life of the proposed power sales agreement" because it "did not present a contract which obligated it to deliver power"); *Petition of East Georgia Cogeneration*, 158 Vt. 525, 614 A.2d 799, 803 (1992) (rates for a proposed cogeneration facility, although consistent with the utility's avoided costs at time of contract, were excessive under current "marketplace realities").

After the milestones expired and the West Penn/Mon Valley PPA lapsed, there was no legally enforceable obligation under the FERC Regulations between those par-

ties. As such, the Commission could not lawfully establish avoided costs without first reviewing all the circumstances relating to the creation of a legally enforceable obligation, and then establishing avoided costs as of that date. Instead, the Commission's action in merely adopting as "new" pricing the capacity rates in the original West Penn/Mon Valley PPA placed "price risk" subsequent to the execution of the original West Penn/Mon Valley PPA upon West Penn's customers without any consideration of the cost consequences of such a decision. If avoided costs were increasing, West Penn's customers might have been greatly advantaged. However, with avoided costs being lower than they were as of the time of the original PPA, West Penn customers stood to be serious losers. However, *under either scenario*, PURPA requires a meaningful and full evaluation of the public interest on the basis of current and relevant information. By establishing new PPA prices based on the rates contained in the original West Penn/Mon Valley PPA, *which had long since expired*, the Commission did not protect the public interest as required under PURPA.

By granting West Penn's Petition in this proceeding, this Court can set the record straight with respect to the type and timing of information that must be considered by state utility commissions when establishing avoided costs.

B. State Public Utility Commissions Have No Authority Under PURPA To Modify the Terms and Conditions of a Voluntarily Negotiated PPA

PURPA specifically contemplates, and upholds the validity of, voluntary agreements such as that reflected in the West Penn/Mon Valley PPA. Specifically, the FERC Regulations, 18 C.F.R. § 292.301(b), provide:

> "Negotiated rates or terms. Nothing in this subpart: (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any

> purchase, which differ from the rates or terms or conditions which would otherwise be required by this subpart; and (2) Affects the validity of any contract entered into between a qualifying facility and a electric utility for any purchase."

FERC's own interpretation of its regulations confirms that utilities and QFs, such as Mon Valley, are permitted to "negotiate out" of PURPA's regulatory rates and other conditions:

> "[This regulation] reflects the Commission's view that the rate provisions of Section 210 of PURPA apply only if a qualifying cogenerator or small power production facility chooses to avail itself of that section. Agreements between an electric utility and a qualifying cogenerator or small power producer for purchases at rates different than rates required by these rules, or under terms or conditions different from those set forth in these rules, do not violate the Commission's rules under Section 210 of PURPA. The Commission recognizes that the ability of a qualifying cogenerator or small power producer to negotiate with an electric utility is buttressed by the existence of the rights and protections of these rules."

45 Fed. Reg. 12,217. Simply stated, the rates, terms and conditions expressed in a negotiated agreement between a QF and a utility are valid and controlling; such terms supersede any PURPA requirements to the contrary. See *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 416 (1983) ("a qualifying facility and a utility may negotiate a contract" that constitutes "a waiver" of PURPA's provisions); See *Kansas City Power & Light Co. v. State Corp. Commission*, 234 Kan. 1052, 1054-57, 676 P.2d 764, 766-67 (1984) (same).

The Commission and the Pennsylvania appellate courts failed to understand the key role that private contracts play under the scheme implemented by FERC under PURPA. As this Court stated in *American Paper In-*

stitute v. American Electric Power Service Corp., 461 U.S. 402, 416 (1983):

> "It may often be in the interest of a qualifying facility to negotiate a long-term contract at a lower rate [than the full avoided cost rate otherwise applicable under the FERC rules]. The [FERC's] rule simply establishes the rate that applies in the absence of a waiver or a specific contractual agreement."

The Commonwealth Court's decision is once again inconsistent with a variety of state court decisions which have expressly recognized that PURPA and the FERC Regulations carve out an area for the private negotiation of contracts, the terms of which are binding on QFs. In *In re Vicon Recovery Systems*, 153 Vt. 539, 572 A.2d 1355 (1990), the Supreme Court of Vermont ruled that because a PPA would not become effective until approved by the Public Service Board, "the essential commitment" for rate purposes was "not undertaken upon the execution of the contract" and "the time of Board approval was the time . . . as of which avoided costs must be examined." 572 A.2d at 1360. The Court rejected the claim by the QF that the Board was required by PURPA and the FERC Regulations to approve the PPA because "[w]here voluntary power purchase contracts are involved . . . [FERC's regulatory] rate scheme is inapplicable . . ." 572 A.2d at 1358. The Supreme Court of Texas in *Public Utility Comm'n v. Gulf States Utilities Co.*, 809 S.W. 2d 201 (Tex. 1991) reversed a public utility commission decision that had disapproved a negotiated contract permitting the utility to recover from its customers payments to the QF in excess of avoided costs. The Supreme Court of Texas held that the state's avoided cost rules implementing PURPA were completely inapplicable to voluntary agreements. 809 S.W. 2d at 207-208. The Court went on to recognize that the FERC Regulations themselves do not grant state commissions the authority to regulate negotiated purchases: "Like the Texas regulations, the federal regulations do not authorize the Com-

mission to alter the terms of a purchase power contract between a utility and a QF." *Id.* at 208.

West Penn and Mon Valley voluntarily negotiated a PPA and accepted a waiver of the provisions of PURPA. When the milestones lapsed and the *voluntary agreement* expired by its own terms, neither PURPA nor the FERC Regulations could lawfully be used to (a) modify the lapsed agreement, (b) determine avoided costs as of the date of the original West Penn/Mon Valley PPA, or (c) create a legally enforceable obligation as of some earlier time.

The Commission and the Pennsylvania appellate courts have completely obliterated any distinction between freely negotiated long-term PPAs *outside* of PURPA and the rights and obligations of QFs *under* PURPA. By allowing a QF developer to use PURPA to modify a PPA which was voluntarily executed outside of that statutory paradigm, the Commission and the Pennsylvania courts have violated the basic tenet of PURPA that "[N]o such rule . . . shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b).

CONCLUSION

WHEREFORE, Metropolitan Edison Company and Pennsylvania Electric Company pray that this Court grant West Penn Power Company's Petition for a Writ Certiorari to the Commonwealth Court of Pennsylvania in this matter.

Respectfully submitted,

ALAN MICHAEL SELTZER
(Counsel of Record)
JEFFREY A. FRANKLIN
RYAN, RUSSELL, OGDEN & SELTZER
1100 Berkshire Boulevard
P.O. Box 6219
Reading, Pennsylvania 19610-0219
(610) 372-4761

Counsel for Amici Curiae Metropolitan Edison Company and Pennsylvania Electric Company

Dated: May 20, 1994